Supreme Court, U.S.
FILED
AUG 24 2000
OFFICE OF THE CLERK

(10)

No. 99-1702

In the Supreme Court of the United States

STATE OF TEXAS,
Petitioner,

v.

RAYMOND LEVI COBB,
Respondent.

On Writ of Certiorari to the
Court of Criminal Appeals of Texas

AMICI CURIAE BRIEF OF TEXAS DISTRICT & COUNTY ATTORNEYS ASSOCIATION, FLORIDA PROSECUTING ATTORNEYS ASSOCIATION, INC., NEW MEXICO DISTRICT ATTORNEYS ASSOCIATION, PENNSYLVANIA DISTRICT ATTORNEYS ASSOCIATION, AND WEST VIRGINIA PROSECUTING ATTORNEYS INSTITUTE, IN SUPPORT OF PETITIONER

STEPHEN G. TIPPS*
JENNIFER L. WALKER ELROD
EDMUND D. DANIELS
MICHAEL C. MASSENGALE
DOUGLAS B. ROBERSON

BAKER BOTTS L.L.P.
One Shell Plaza
910 Louisiana
Houston, Texas 77002-4995
(713) 229-1234

COUNSEL FOR *AMICI*

**Counsel of Record*

2249

This is a capital case.

QUESTION PRESENTED

When an accused has been indicted for burglary, does his offense-specific Sixth Amendment right to assistance of counsel attach to questioning about subsequent murders when the eventual capital murder conviction is not based on the previously charged burglary as a predicate felony?

TABLE OF CONTENTS

Question Presented i

Table of Contents ii

Index of Authorities iii

Statement of *Amici* Interest 1

Introduction 2

Argument 4

I. Separate "Charges" Constitute Separate "Offenses" for the Purposes of the Sixth Amendment. 5

II. Because the Sixth Amendment Right to Assistance of Counsel Attaches Only to Specific Charged Offenses, Cobb's Burglary-Related Sixth Amendment Rights Were Not Violated When He Was Questioned About Murder Charges 8

III. The *Blockburger* Test for Distinguishing Between Offenses Allows Offense-Specific Sixth Amendment Rights to Co-Exist with Prosecutorial Discretion. 10

IV. Under an Alternative "Very Closely Related" Factual Similarity Standard, Cobb's Sixth Amendment Right To Assistance of Counsel Was Not Violated. 12

V. Conclusion. 16

INDEX OF AUTHORITIES

Cases

Blockburger v. United States, 284 U.S. 299 (1932) . . . *passim*

Brewer v. Williams, 430 U.S. 387 (1977) 2

Cobb v. State, No. 72,807, 2000 WL 275644 (Tex. Crim. App. Mar. 15, 2000) 4

Day v. State, 534 S.W.2d 681 (Tex. Crim. App. 1976) . . . 15

Edwards v. Arizona, 451 U.S. 477, 484 (1984) 3

Kirby v. Illinois, 406 U.S. 682 (1972) ..... *passim*

Maine v. Moulton, 474 U.S. 159 (1985) 11

Massiah v. United States, 377 U.S. 201 (1964) 2

McNeil v. Wisconsin, 501 U.S. 171 (1991) ..... *passim*

Michigan v. Jackson, 475 U.S. 625 (1986) 2

Miranda v. Arizona, 384 U.S. 436 (1966) 8

Moran v. Burbine, 475 U.S. 412, 426 (1986) 6

Powell v. Alabama, 287 U.S. 45 (1932) 2

United States v. Cooper, 949 F.2d 737 (5th Cir. 1991) . . . 13

United States v. Covarrubias, 179 F.3d 1219 (9th Cir. 1999) 16

United States v. Gouveia, 467 U.S. 180 (1984) ..... *passim*

United States v. Hines, 963 F.2d 255 (9th Cir. 1992) 13

United States v. Louis, 679 F. Supp. 705 (W.D. Mich. 1988) 12

United States v. Wade, 388 U.S. 218 (1967) 2

Whittlesey v. State, 665 A.2d 223 (Md. 1995) 12, 13

Constitutional Provisions

U.S. CONST. amend V ..... *passim*

U.S. CONST. amend VI ..... *passim*

Statutory Provisions

TEX. PEN. CODE ANN. § 19.02 (Vernon 1994) 12

TEX. PEN. CODE ANN. § 30.02 (Vernon 1994) 12, 15

Other Authorities

Paul Cassell, *Protecting the Innocent from False Confessions and Lost Confessions -- and from* Miranda, 88 J. Crim. L. & Criminology 497 (1998) 7

Samuel R. Gross, *Loss of Innocence: Eyewitness Identification and Proof of Guilt*, 16 J. Legal Stud. 395, 431 (1987) 7

Ayre Rattner, Convicting the Innocent: When Justice Goes Wrong (1983) (Ph.D. dissertation, Ohio State University) 7

Wharton's Criminal Law § 34 (11th ed.) 15

STATEMENT OF *AMICI* INTEREST

Both Petitioner and Respondent have consented to the filing of this *amici curiae* brief in support of Petitioner, and letters of consent have been filed with the Clerk simultaneously with this brief.*

The Texas District & County Attorneys Association is an organization which serves its members by producing comprehensive continuing legal education courses for employees in prosecutors' offices, providing technical assistance to the prosecution community and related criminal justice agencies, and serving as a liaison between prosecutors and other organizations involved in the day-to-day administration of criminal justice.

All *amici curiae* joining this brief are similar organizations composed of individuals whose professions involve the investigation and prosecution of criminal activity. As such, the *amici* are acutely interested in the fair and efficient administration of criminal justice. The *amici* believe that this brief will not duplicate those of the parties. Rather, as a broad-based coalition of criminal justice professional organizations, the *amici* believe that they offer a unique perspective on the issues at stake and that such a perspective will be of assistance in the Court's resolution of the case.

The *amici* support the Petitioner's request for relief from the judgment of the Texas Court of Criminal Appeals both because *Cobb* presents an opportunity for this Court to resolve an important constitutional question upon which numerous state and federal

---

* This brief has not been authored, in whole or in part, by counsel for a party. With the exception of the printing of this brief, which was performed by the State of Texas, no other person or entity, other than the *amici curiae*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief.

courts disagree, and because the decision of the Texas court is contrary to the decisions of this Court concerning the attachment of the Sixth Amendment right to counsel and the application of this Court's decision in *Michigan v. Jackson*, 475 U.S. 625 (1986), which protects Sixth Amendment rights by proscribing police-initiated interrogation outside the presence of counsel after an accused has actively invoked his Sixth Amendment right to counsel. The *Cobb* decision especially burdens the members of the *amici* organizations by further confusing an already unsettled body of case law in the federal and state courts applying *Michigan v. Jackson*. This confusion is tangible in Texas due to a split of authority between state and federal courts. The *amici* respectfully ask that this Court provide clear guidance to the law enforcement community concerning the administration of Sixth Amendment rights.

INTRODUCTION

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence." U.S. CONST. amend. VI. This guarantee applies to the states via the Due Process Clause of the Fourteenth Amendment. *See Powell v. Alabama*, 287 U.S. 45, 68-69 (1932).

A criminal defendant's Sixth Amendment right to assistance of counsel attaches upon the "initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Kirby v. Illinois*, 406 U.S. 682, 689 (1972). Such proceedings include pretrial proceedings deemed "critical stages," *i.e.*, those at which "the results might well settle the accused's fate and reduce the trial to a mere formality." *United States v. Wade*, 388 U.S. 218, 224 (1967), *see also United States v. Gouveia*, 467 U.S. 180, 189 (1984). Police interrogation occurring after a suspect has been charged with an offense is one such critical stage. *See, e.g., Michigan v. Jackson*,

475 U.S. 625, 629-30 (1986); *Brewer v. Williams*, 430 U.S. 387, 400-01 (1977); *Massiah v. United States*, 377 U.S. 201, 206 (1964).

The Sixth Amendment right to assistance of counsel is offense-specific. *See McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991). Thus, the Sixth Amendment right to assistance of counsel "cannot be invoked once for all future prosecutions, for it does not attach until a prosecution is commenced." *McNeil*, 501 U.S. at 175.

The purpose of the Sixth Amendment right to assistance of counsel is to "'protec[t] the unaided layman at critical confrontations' with his 'expert adversary,' the government, after 'the adverse positions of government and defendant have solidified' with respect to a particular alleged crime." *McNeil*, 501 U.S. at 177-78 (quoting *Gouveia*, 467 U.S. at 189). This purpose is distinct from that of the Fifth Amendment "right to counsel," which protects "the suspect's 'desire to deal with the police only through counsel.'" *McNeil*, 501 U.S. at 178 (quoting *Edwards v. Arizona*, 451 U.S. 477, 484 (1984)). An invocation of the Sixth Amendment right to assistance of counsel does not constitute an invocation of the Fifth Amendment right. *McNeil*, 501 U.S. at 177-78. The rights to assistance of counsel protected by the Fifth and Sixth Amendments are distinct, protecting entirely different interests. *See McNeil*, 501 U.S. at 178. An individual may invoke the Sixth Amendment right to assistance of counsel as to a charged offense and yet be perfectly willing to speak to police about other possible offenses without the assistance of counsel. *See id.* at 178.

That the Sixth Amendment right to assistance of counsel does not attach until the initiation of formal proceedings against an individual is critical to an understanding of the Sixth Amendment right. *See Gouveia*, 467 U.S. at 189 ("[O]ur conclusion that the right to counsel attaches at the initiation of adversary judicial criminal proceedings 'is far from a mere formalism.'" (quoting *Kirby*, 406 U.S. at 689). The right does not and cannot attach until the instigation of adversarial proceedings because "it is only then

that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.'" *Kirby*, 406 U.S. at 689; *see also Gouveia*, 467 U.S. at 189.

When these bedrock Sixth Amendment principles are applied to the facts of this case, it is plain that Cobb's indictment on a *burglary* charge could not lead to the attachment of Sixth Amendment rights with respect to later-filed *capital murder* charges.

The question for the Court to resolve, then, is a simple one: How are multiple "offenses" distinguished from one another for the purposes of applying the "offense-specific" Sixth Amendment right to assistance of counsel?

ARGUMENT

The Texas Court of Criminal Appeals erred by ruling in *Cobb v. State*, No. 72,807, 2000 WL 175644 (Tex. Crim. App. Mar. 15, 2000), that the Sixth Amendment right to counsel for a burglary charge also attaches to subsequent, unrelated murder charges. This ruling frustrates effective law enforcement by its unwarranted, overbroad interpretation of what constitutes an "offense" for the purposes of the Sixth Amendment. Under a proper understanding of the Sixth Amendment right to assistance of counsel, law enforcement officials are not prohibited from continuing to investigate other potential but not-yet-charged offenses, even though the suspect's Sixth Amendment right to assistance of counsel has attached to an unrelated, non-predicate offense.

Thus, Cobb's voluntary confession to the murders of Maggie and Kori Rae Owings fifteen months after his indictment on a burglary charge was properly admissible at his capital murder trial.

I. Separate "Charges" Constitute Separate "Offenses" for the Purposes of the Sixth Amendment.

Separate "charges" constitute separate "offenses" for purposes of determining when the offense-specific Sixth Amendment right to assistance of counsel attaches. In *McNeil v. Wisconsin*, 501 U.S. 171 (1991), the Court rejected petitioner's proposal that the assertion of the offense-specific Sixth Amendment right to assistance of counsel should imply an assertion of the non-offense-specific Fifth Amendment right to assistance of counsel, noting that the proposed rule, in addition to being of dubious constitutionality, was just bad policy. *See id.* at 180. In so doing, the Court noted that "[t]here is not the remotest chance that [a suspect who wishes to communicate with the police only through an attorney] will feel 'badgered' by their asking to talk to him without counsel present, since the subject will not be the *charge* on which he has already requested counsel's assistance . . . ." *Id.* (emphasis supplied). In other words, the proposed rule would not benefit a suspect who has invoked his Sixth Amendment right to counsel because the Sixth Amendment right attaches only to a particular *offense*, and subsequent interviews by the police as to a different *offense* do not violate the offense-specific Sixth Amendment right to assistance of counsel.

Clarifying that separate charges constitute separate offenses links the definition of "offense" to the essence of the constitutional purpose of the Sixth Amendment right to assistance of counsel. The Sixth Amendment right to assistance of counsel does not attach until the instigation of formal proceedings because "it is only then that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified." *Kirby*, 406 U.S. at 689; *see also Gouveia*, 467 U.S. at 189. If the State, in its discretion, elects not to prosecute an individual, the Sixth Amendment right to assistance of counsel does not attach because the State never assumes an adversarial role with

respect to that individual. Consistent with that constitutional purpose, by leaving to the State the authority to define distinct charges (*i.e.*, distinct offenses), the Sixth Amendment accommodates the State's exercise of its discretion to decide whether to prosecute a particular offense. Therefore the Sixth Amendment right to assistance of counsel should not attach to a charge, or offense, that the State has not as yet elected to prosecute.

An expansion of the Sixth Amendment to include a right to assistance of counsel for an as-yet uncharged (and perhaps as-yet uncontemplated) series of crimes, such as those committed by Cobb, would severely undermine the effectiveness of the criminal justice system. By way of example, Cobb went on a crime spree, deciding first to burglarize a house, then deciding to murder a mother, and then deciding to murder a child. The Court should not expand the concept of a single "offense" to encompass such sequential crime sprees.

The rationale employed by the Court to reject the petitioner's proposal in *McNeil* that an invocation of the Sixth Amendment right should constitute an invocation of the Fifth Amendment right to counsel is even more appropriate in the present context:

> [I]f [the Court] were to adopt [petitioner's proposed] rule, most persons in pretrial custody for serious offenses would be unapproachable by police officers suspecting them of involvement in other crimes, even though they have never expressed any unwillingness to be questioned. *Since the ready ability to obtain uncoerced confessions is not an evil but an unmitigated good, society would be the loser.* Admissions of guilt resulting from valid *Miranda* waivers are 'essential to society's compelling interest in finding, convicting, and punishing those who violate the law.'

McNeil, 501 U.S. at 181 (quoting *Moran v. Burbine*, 475 U.S. 412, 426 (1986)) (emphasis supplied). Any definition that expands "offense" beyond "charge" to include crime sprees, be they brief or far-reaching, will certainly reduce the number of uncoerced confessions in unrelated crimes, making society less safe and making the criminal justice system less just.

Indeed, the practical impact of the loss of truthful confessions has been highlighted recently by academics. *See, e.g.*, Paul Cassell, *Protecting the Innocent from False Confessions and Lost Confessions -- and from* Miranda, 88 J. Crim. L. & Criminology 497 (1998). According to Professor Cassell, "[f]alse confessions are a relatively infrequent cause of wrongful convictions. On the other hand, truthful confessions from the true perpetrators of crimes are perhaps the most frequent way in which miscarriages of justice are uncovered." *Id.* at 502. Specifically, Professor Cassell relies on two empirical studies of wrongful convictions that estimate the percentage of uncovered wrongful convictions due to truthful confessions to be 40 percent and 54 percent, respectively. *See id.* at 530-531 (citing Samuel R. Gross, *Loss of Innocence: Eyewitness Identification and Proof of Guilt*, 16 J. Legal Stud. 395, 431 (1987), and Ayre Rattner, Convicting the Innocent: When Justice Goes Wrong, 45-49 & tbl. 8 (1983) (Ph.D. dissertation, Ohio State University) (on file with Univ. Microfilms, Int'l)). At the very least, the *amici* believe this Court should weigh this substantial public benefit against any supposed benefits of an expanded rule.

Specifying that separate charges constitute separate offenses under the Sixth Amendment provides the additional benefit of producing a clear rule for courts, police, prosecutors, and individuals. Law enforcement officials such as those represented by these *amici curiae* and other similarly situated organizations constantly strive to train themselves and others in the law enforcement community about the constitutional boundaries governing their conduct in the course of investigating and

prosecuting crimes. By clarifying that the Sixth Amendment right to counsel attaches only to charged offenses and not to other charges which may or may not be brought in the future, the Court has an opportunity to provide constitutional guidance to the criminal justice community while preserving the societal good of uncoerced, truthful confessions.

II. Because the Sixth Amendment Right to Assistance of Counsel Attaches Only to Specific Charged Offenses, Cobb's Burglary-Related Sixth Amendment Rights Were Not Violated When He Was Questioned About Murder Charges.

In light of the fact that only burglary charges had been brought against Cobb when he allegedly invoked a Sixth Amendment right to assistance of counsel, the Odessa police did not violate Cobb's Sixth Amendment right to counsel by interrogating him later about the murders of Maggie and Kori Rae Owings.

In his initial meeting with police, after a complete and thorough reading of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), Cobb waived his Fifth Amendment right to communicate with police through counsel, electing instead to confess to the burglary of the Owings home. Despite confessing the burglary, Cobb denied any connection to the disappearance of Maggie and Kori Rae.

The State then commenced formal proceedings against Cobb, arraigning him on the charge of burglary. The court appointed counsel for Cobb at the arraignment. Even assuming that Cobb invoked his Sixth Amendment right to assistance of counsel by passively accepting the appointment of counsel as to the burglary charge (a point which *amici* have not briefed, but which they do not concede), it absolutely does not follow that the Sixth Amendment right to assistance of counsel attached to any possible future charge against Cobb arising from the disappearance of Maggie and Kori

Rae (as opposed to the disappearance of the *belongings* of Maggie and Kori Rae). Based on Cobb's denial of any involvement in Maggie's and Kori Rae's disappearance and the lack of direct evidence linking Cobb to the disappearance, the State did not charge Cobb with any offense relating to their disappearance. Consequently, the adversarial relationship between Cobb and the prosecution had not solidified with respect to other offenses, such as murder, which might be charged at a later date based on further investigation of the disappearance. Thus, the Sixth Amendment right to assistance of counsel was in no way implicated as to the future murder charge.

Fifteen months after his voluntary confession to burglary, Cobb revealed to his father that he murdered Maggie and Kori Rae. After Cobb's father called the police, Odessa police officers promptly took Cobb into custody to question him about his involvement in the disappearances. The Odessa police read Cobb his *Miranda* rights, and they confirmed that Cobb understood his rights, including his Fifth Amendment right to communicate with police only through counsel. Cobb knowingly and intelligently waived those rights and then confessed to the police that he killed Maggie and Kori Rae. Based on Cobb's confession, the State commenced formal proceedings against Cobb, charging him with the murders of Maggie and Kori Rae Owings. Cobb's Sixth Amendment right to assistance of counsel with respect to the murder charges did not attach until some time after the police received a tip from Cobb's father and then renewed their murder investigation. Because Cobb confessed to the murders without ever invoking his Sixth Amendment right to the assistance of counsel with respect to the murder charges, the State properly introduced the evidence gathered from that confession in prosecuting Cobb for the murders of Maggie and Kori Rae.

III. The *Blockburger* Test for Distinguishing Between Offenses Allows Offense-Specific Sixth Amendment Rights to Co-Exist with Prosecutorial Discretion.

In *Blockburger v. United States*, 284 U.S. 299 (1932), the Court laid out an elements test which outlined the scope of the constitutional meaning of "offense," and that standard provides an additional restraint to ensure that the State does not abuse its discretion to make charging decisions in order to circumvent the Sixth Amendment right to assistance of counsel.

Blockburger concerned the constitutional scope of "offense" in the Fifth Amendment double jeopardy context. In analyzing the issue of double jeopardy, which protects an individual from being prosecuted twice for substantially the same offense, the Court was called to define the precise scope of "offense" as used in the Constitution. *See* U.S. CONST. amend. V ("[N]or shall any person be subject for the same *offence* to be twice put in jeopardy of life or limb." (emphasis supplied)); *Blockburger*, 284 U.S. at 301. Like the Fifth Amendment's double jeopardy prohibition, the effect of the offense-specific Sixth Amendment turns on the precise constitutional meaning of "offense," and the Court should import *Blockburger*'s framework for distinguishing separate offenses in order to provide clear guidance for the similar inquiry in the Sixth Amendment context.

Addressing whether separate charges arising out of the same drug sale under the Narcotics Act violated Fifth Amendment double jeopardy, the Court held in *Blockburger* that such charges constituted different offenses because each charge "required proof of a different element." *Blockburger*, 284 U.S. at 304. In fashioning this elements test for determining the constitutional meaning of offense, the Court responded to a legitimate concern that the government might create nominally distinct but substantively identical charges which would enable it to continue prosecuting for the same "offense" until obtaining a successful

conviction. The elements test provides a familiar and time-tested safeguard precisely to prevent against such abuse.

Blockburger's constitutional understanding of "offense" provides a similar protection to the offense-specific Sixth Amendment right to protection of counsel. Under the charge test, the State properly exercises discretion when deciding whether to prosecute a particular offense. The *Blockburger* delineation of the constitutional meaning of "offense" circumscribes that discretion by ensuring that the State cannot create nominally distinct but elementally identical charges in order to circumvent an individual's Sixth Amendment right to assistance of counsel. *Cf. Maine v. Moulton*, 474 U.S. 159, 176 ("[T]he Sixth Amendment is violated when the State obtains incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent."). With the *Blockburger* protection in place, the State could not create two different charges with identical elements, charge an individual with the first (to which the right to assistance of counsel would attach), interrogate afterwards in the absence of counsel (but after issuing the *Miranda* warnings), and then use any incriminating information to prosecute the second charge.

The charge test, when understood in the constitutional framework laid out by *Blockburger*, thus provides a definition of "offense" in the context of applying the Sixth Amendment right to assistance of counsel that is consistent with the purpose of the Sixth Amendment and fully protects the interests of the individual. This multifaceted test checks the State's discretion to create charges and interrogate suspects, while simultaneously promoting society's interest in encouraging uncoerced confessions. Individuals need not fear that the State will be able to deprive them of the constitutionally guaranteed right to assistance of counsel with respect to a charged offense once they have asserted that right and the adversarial positions of the State and the individual have

solidified. At the same time, the State may continue to investigate and discuss matters involving other possible offenses without forcing the individual to take an adversarial stance to the state in all discussions, which is without doubt an "unmitigated good." *McNeil*, 501 U.S. at 181.

In Cobb's case, the murder and burglary charges are constitutionally distinct offenses under *Blockburger* because they involve different elements. In Texas, burglary involves breaking and entering into a personal dwelling with felonious intent (usually theft). *See* TEX. PEN. CODE ANN. § 30.02 (Vernon 1994). Murder involves the taking of human life and does not require breaking and entering. *See* TEX. PEN. CODE ANN. § 19.02 (Vernon 1994). In short, burglary and murder are *not* the same offense, and under the established and familiar precedents of this Court, there are grounds for distinguishing Cobb's charged offenses and the attachment of the Sixth Amendment right to assistance of counsel with respect to those separate offenses.

IV. Under an Alternative "Very Closely Related" Factual Similarity Standard, Cobb's Sixth Amendment Right To Assistance of Counsel Was Not Violated.

Several federal circuits have developed a factual similarity test to determine whether a second criminal act is sufficiently "closely related" to the first such that they constitute the same offense. Under this standard, the Sixth Amendment right to assistance of counsel is considered to attach to the second act when it attaches to the first. *See, e.g., Whittlesey v. State*, 665 A.2d 223, 224, 235 (Md. 1995) ("The unifying theme among the Sixth Amendment cases has been that the right to counsel carries over only to new charges arising from 'the same acts on which the [pending] charges were based.'" (quoting *United States v. Louis*, 679 F. Supp. 705, 709 (W.D. Mich. 1988) (surveying the approaches employed by courts to determine whether two criminal acts constitute the same offense for purposes of the attachment of the Sixth Amendment right to

counsel))). Under such an approach, courts look for "identity of time, place, and conduct," *Whittlesey*, 665 A.2d at 235, and occasionally identity of parties, *see, e.g., United States v. Hines*, 963 F.2d 255, 257-58 (9th Cir. 1992), to determine whether a second criminal act is sufficiently closely related to a first to merit Sixth Amendment right to counsel protection at the time the right attaches to the first criminal act. *See Whittlesey*, 665 A.2d at 235.

Courts applying this standard have followed two general approaches in deciding how strictly to interpret "closely related" in the Sixth Amendment context. *See id.* at 234. One line of cases has construed "closely related" more broadly where there is evidence of deliberate police misconduct. *See id.* at 234-35. In cases in which there is no evidence of police misconduct, however, courts have defined "closely related" very narrowly, requiring, for example, that the two criminal acts be "inextricably intertwined." *See id.* at 235 (quoting *United States v. Cooper*, 949 F.2d 737, 743 (5th Cir. 1991)).

Should the Court adopt the "closely-related offense" standard, it should apply the more stringent "inextricably intertwined" test to determine that the Odessa police did not violate Cobb's Sixth Amendment right to assistance of counsel by interrogating him regarding the murders after counsel attached for the burglary charge. *See Whittlesey*, 665 A.2d at 234-35 (when there is no "evidence of deliberate police misconduct," the court considers "whether this case falls within the second line of cases . . . [which] focus entirely on whether the facts underlying charged and uncharged offenses are 'closely related,' 'inextricably intertwined,' or 'inextricably enmeshed'" (citations omitted)). There is absolutely no evidence of deliberate misconduct by the Odessa police. The officers did not know that Cobb had counsel, or even that he had been arraigned, on a prior burglary charge; they only sought to respond as they best saw fit to a cold call offering information about an unsolved murder. The Odessa police followed

all proper procedures, carefully explaining to Cobb his rights under *Miranda* and obtaining from him a written waiver. By initialing the written waiver form, Cobb confirmed that he knowingly and intelligently waived each Fifth Amendment right available to him, including his right to communicate with police only through an attorney. Only after carefully securing Cobb's written waiver did the Odessa officers begin to discuss the murders, to which Cobb readily confessed.

Under the "very closely related" test, the Odessa police did not violate Cobb's Sixth Amendment right to counsel because the murder charges are sufficiently distinct from the burglary charge. Specifically, the murders and the burglary differed in conduct, time, place and identity of the parties involved.

The murders and the burglary committed by Cobb involved conduct so different that to lump those acts under a common umbrella of "offense" would render that term meaningless. Cobb's burglary involved breaking and entering a dwelling that may or may not have been occupied. It involved the desire at the time of illegal entry to commit theft or some other felony. On the other hand, Cobb's murder of Maggie Owings involved the brutal slaying of another individual. Cobb's subsequent murder of Kori Rae Owings involved the wanton disregard of a helpless child's life. Cobb's burglary quite simply was *not* part of the same physical act or series of acts as the two subsequent murders.

Moreover, the State classifies murder and burglary as distinct offenses because the acts represent different harms to society. *Cf. Blockburger*, 284 U.S. at 303-304 (holding that two separate provisions of the Narcotics Acts created two distinct offenses because each was designed to protect a particular interest, notwithstanding that petitioner violated both during the "same" drug sale). The statutory offense of burglary is designed to protect the interests of owners in the security of habitations and buildings. *See, e.g., Day v. State*, 534 S.W.2d 681 (Tex. Crim. App. 1976). In

contrast, the murder statute is designed to protect the sanctity of life.

Cobb committed the murders later in time and subsequent to the burglary, and the definition of a single "offense" should not include a common "crime spree," contingent only on duration. Cobb's murderous acts took place after the burglary was complete. In Texas, burglary is statutorily defined as the illegal entry on private premises with felonious intent, *see* TEX. PEN. CODE ANN. § 30.02 (Vernon 1994), in which case the offense of burglary is complete at the time of entry. Even under an alternate statutory definition of burglary as the commission of a felony while located on the premises after illegal entry, *see id.*, at least one of the murders committed by Cobb took place after he left the premises, in which case the burglary was once again complete prior to that murder. Cobb murdered Maggie Owings after entering the premises with the intent to steal, and he murdered Kori Rae Owings after completing the burglary, however defined.

That the murders happened shortly after the burglary was complete is irrelevant. *Cf. Blockburger*, 284 U.S. at 301-02 (rejecting as "unsound" petitioner's argument that the payment for a second quantity of drugs shortly after the delivery of the first quantity constituted one "continuing offense"). This Court held in *Blockburger* that "[e]ach of several successive sales constitutes a distinct offense, however closely they may follow each other." *Id.* The Sixth Amendment should not provide additional protection to an individual merely because he engages in a brief crime spree rather than in a more extended one. *Cf. id.* at 302 ("'If successive impulses are separately given, even though all unite in swelling a common stream of action, separate indictments lie.'" (quoting *Wharton's Criminal Law* § 34 (11th ed.))).

Finally, the links between the burglary and the murders formed by the place of the crime and the identity of the parties involved are tenuous at best. Cobb committed the burglary at the Owings home.

He killed Kori Rae more than a mile away, burying her alive at the site where he dumped Maggie's body. Moreover, Cobb is the only party common to the three criminal acts. Burglary does not depend on the presence of anyone in the home; Cobb could have been just as guilty of burglary if neither Maggie nor Kori Rae had been home the day Cobb entered the premises with felonious intent. In that sense, neither the presence of Maggie nor Kori Rae was a necessary element to Cobb's burglary of the Owings home. Maggie and Kori Rae were essential, however, to the murders. Making the identity-of-the-parties inquiry hinge solely on whether there is a common perpetrator would once again reduce "offense" to nothing more than "crime spree," a constitutionally unacceptable result.

Thus, Cobb's murders differed from the burglary in time, place, conduct and identity of the parties involved. Under the factual "very closely related" test embraced by several circuits and based on these factors, *see, e.g.*, *United States v. Covarrubias*, 179 F.3d 1219, 1223, 1225 (9th Cir. 1999), the Sixth Amendment right to assistance of counsel never attached to the gruesome murders simply because Cobb committed a completely different offense of burglary beforehand. The Texas Court of Criminal Appeals erred by concluding otherwise.

V. Conclusion.

The Court in *McNeil* made clear that the purpose of the offense-specific Sixth Amendment counsel guarantee is to protect the unaided layman at critical confrontations with his expert adversary, the government, *after* the adverse positions of government and defendant have solidified with respect to a particular alleged crime. *See McNeil*, 501 U.S. at 177-78. The adverse positions of Cobb and the State of Texas did not solidify with respect to the Owings murders until after the police learned of Cobb's confession. Accordingly, Cobb's Sixth Amendment rights respecting those charges did not arise until Cobb's indictment on capital murder charges. By that time, Cobb had already confessed the murders to

the police. As a result, Cobb's confession was properly used to secure his conviction for two counts of capital murder and that conviction should not have been reversed by the Texas Court of Criminal Appeals on Sixth Amendment grounds.

Respectfully submitted,

Stephen G. Tipps
Counsel of Record
Jennifer L. Walker Elrod
Edmund D. Daniels
Michael C. Massengale
Douglas B. Roberson

BAKER BOTTS L.L.P.
One Shell Plaza
910 Louisiana
Houston, Texas 77002-4995
(713) 229-1234